[34619]

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

*Petitioner,*

*against*

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

*Respondents.*

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

## SUPPLEMENTAL BRIEF, *AMICUS CURIAE,* BY THE CITY OF NEW YORK ON BEHALF OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK.

April 18, 1955

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public streets and parks were used for religious purposes as in *Kunz* v. *New York*, 340 U. S. 290 (1951), and *Niemotko* v. *Maryland*, 340 U. S. 268 (1951).

In the *McCollum* case, *supra*, this Court held violative of the First Amendment a religious instruction program in which pupils were released from part of their secular program on condition that they attend religious instruction classes given in public school classrooms by teachers not paid by the local education board. The program was ruled invalid in that (1) the State's tax-supported public school buildings were used for the dissemination of religious doctrines; and (2) the State afforded sectarian groups an invaluable aid in that it helped to provide pupils for religious instruction through the machinery of the State's compulsory school attendance laws.

This Court in *Zorach* v. *Clauson*, *supra*, determined that the released time program of the New York City Board of Education did not violate the Constitution since public school classrooms were not used for religious instruction, nor was the public school system used directly to promote such instruction.

Mr. Justice FRANKFURTER in his concurring opinion in *McCollum* v. *Board of Education*, *supra*, traced the history and purpose of the public school system in the United States and stated in part (pp. 216-217):

> "The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."

School buildings of necessity are identified with the school system, especially in the minds of the school children and their parents. The New York State Commissioner of

Education, in his quasi judicial decisions involving the use of school buildings, has sought to give effect to the concept that schools and school buildings should have a true academic atmosphere. They should not be the center of divisive conflicts in the community. (The Court is respectfully referred to pp. 7-9 of the *amicus* brief for rulings by the Commissioner.)

The constitutional rights of a religious group are not violated by denying them the use of a public school building for the purpose of conducting a religious service or discussion. On the contrary, under the decision in the *McCollum* case, *supra*, the school authorities would be violating the Constitution if such a use were permitted. Yet these same people could utiiize a public street or park to conduct a discussion calculated to convert others to their religious point of view. *Kunz* v. *New York* and *Niemotko* v. *Maryland*, *supra*.

In view of the foregoing, public school buildings cannot be deemed to be among the traditional forums available for the exercise of freedom of speech and religion. Accordingly, the petitioner's rights of freedom of speech and assembly are not violated by a refusal to permit the petitioner to use a school building.

## The Question of Whether the Regulations of the Yonkers Board of Education are Unconstitutionally Vague is not Properly Before This Court.

**(1)**

The petitioner predicates his argument on the theory that the same rights for the exercise of freedom of speech and assembly attach to school buildings as to streets and parks (Brief of petitioner, p. 14). If the petitioner's premise is unsound, as we contend, then it would appear to be unnecessary for this Court to consider whether or not it may examine into the regulations governing the use of school buildings promulgated by the Yonkers Board of Education.

**(2)**

In any event, we demonstrated in the main *amicus curiae* brief submitted on behalf of the New York City Board of Education that this petitioner did not challenge the regulations of the Yonkers Board in any of the New York State courts (p. 14, *Amicus* Brief). The record and the briefs are barren of any indication that the New York courts were asked to consider the question of whether the regulations were illegally vague. It is equally clear that the courts did not consider the regulations in reaching their determinations.

If this Court rules that the petitioner has a constitutional right to use school buildings for free speech and assembly, the New York courts should be given the opportunity to determine whether the petitioner must, by virtue of Education Law § 414, address a challenge as to the unconstitutionality of the regulations of the Yonkers Board to the New York State Commissioner of Education. (The Court is respectfully referred to p. 14 Brief of the *Amicus* for the discussion on this point.)

On oral argument questions were asked by this Court as to the finality of the determinations of the New York State Commissioner of Education. The petitioner in his supplemental brief on reargument has stated (p. 7) "If the petitioner had appealed to the Commissioner then by reason of the text of Section 310, Education Law and by construction, *Chapin* v. *Board of Education*, 291 N. Y. 241, he would have been barred from appeal to the Courts." In view of the foregoing, a brief discussion of this aspect of the case seems essential.

Education Law § 310 states that "any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; * * * and his decisions in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever." (The full text of the statute is cited at pp. 18-19 of the *Amicus* Brief.)

The New York State courts have interpreted this section to mean that a person may in the first instance seek a review either before the Commissioner of Education or the courts. A petitioner may not however seek a *de novo* review before both. If the petitioner herein goes to the Commissioner, the courts will be available for a review to determine whether or not the Commissioner was arbitrary or capricious in his ruling.

The law is well stated in *Matter of Ross* v. *Wilson*, 284 App. Div. 522 (3rd Dept., 1954), at 526-7:

> "Instead of resorting to the courts in the first instance, the petitioners chose to appeal to the Commissioner of Education, as they had the right to do under the Education Law. Having appealed to him, they must accept his decision as conclusive (*Barringer* v. *Powell*, 230 N. Y. 37; *Matter of Chapin* v. *Board of Educ.*, 291 N. Y. 241).
>
> It should be borne in mind that this proceeding is brought to review the commissioner's decision upon the appeal taken by the petitioner to the commissioner, not to determine *de novo* the propriety of the action of the Board of Education or of the voters of the district. There can be no question as to the applicability of the finality rule to this proceeding. Under its plain terms, section 310 of the Education Law is applicable to the review of any decision made by the commissioner upon an appeal to him from the action of a school district meeting or from an official act or decision of school authorities.
>
> Our only power, under the circumstances, is to determine whether there was a reasonable basis for the commissioner's interpretation of the statute, so that it cannot be stigmatized as purely arbitrary or wholly lacking in rationality. We accordingly analyze the conflicting interpretations advanced by the parties, with that end in view."

The case of *Matter of Chapin* v. *Board of Education*, 291 N. Y. 241 (1943), cited by the petitioner to support his contention that he would be barred from the courts if he

appealed to the Commissioner, stands only for the proposition that the petitioner could not seek a *de novo* hearing in the Courts if he first went to the Commissioner. The right to review the action of the Commissioner for arbitrariness is clear. The Court said at p. 244:

> "Section 890 of the Education Law makes 'final and conclusive, and not subject to question or review in any place or court whatever', a decision of the Commissioner of Education on an 'appeal' to him in a controversy such as this. Similar provisions have been in the statutes since 1822 (see chapter 256 of the laws of that year). Since the Commissioner's determination of this controversy is not shown to have been 'purely arbitrary', it was and is final and binding on petitioner and his colleagues. (*Matter of Levitch* v. *Board of Education*, 243 N. Y. 373.)"

The foregoing comments apply generally to a review of actions of boards of education under § 310 of the Education Law. Since the dispute here involved concerns a regulation of the Yonkers Board, we argued in our main brief (p. 14) that Education Law, § 414, required the petitioner to bring his appeal in the first instance to the Commissioner. In the event that the New York Courts so construe Education Law § 414 the petitioner would still have available to him a review in the Court as to whether the Commissioner's determination was arbitrary. Obviously if the Commissioner were to hold valid regulations patently unconstitutionally vague the New York Courts would hold his determination arbitrary.

## CONCLUSION

**The Courts below properly ruled that this petitioner had no clear legal right to the use of school buildings. If any question exists as to the vagueness of the regulations adopted by the Yonkers Board of Education, the petitioner has available to him an appeal to the Commissioner of Education of the State of New York. Accordingly, the order appealed from should be affirmed and this appeal dismissed.**

New York, April 18, 1955.

Respectfully submitted,

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